Submitted
Judge Davis
Mr Fields
Wade

# SUPREME COURT OF THE UNITED STATES.

No. ~~469.~~ 237

THE UNITED STATES, PLAINTIFFS,

vs.

EDWARD MYNDERSE AND CHARLES D. MYNDERSE, SURVIVORS, ETC.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED JULY 25, 1870.

Negatives 1st &
Affirms 2 ~~Qu~~ Questions
10 Wall -
U.S. v Hodge

1 UNITED STATES OF AMERICA,
*Northern District of New York, ss:*

At a circuit court of the United States of America, begun and held at Canandaigua, in and for said northern district of New York, on the third Tuesday of June, A. D. 1870, and in the ninety-fourth year of the independence of the United States:

Present, Hon. Lewis B. Woodruff, circuit judge, and Hon. Nathan K. Hall, district judge.

THE U. S. OF AMERICA
*vs.*
EDWARD MYNDERSE AND CHARLES D. MYNderse, survivors, &c.

*State of the pleadings.*

This is an action of debt upon a bond given by Jane Goodwin, deceased, and the defendants, her sureties, on the twenty-third
2 day of February, A. D, 1863, under section thirty-nine of the act of Congress approved July first, A. D. 1862, entitled "An act to provide internal revenue to support the government, and to pay interest on the public debt;" the declaration therein being in the words and figures following, to wit:

3 "United States circuit court for the northern district of New York, of January term, 1868, to wit, of the 3d Tuesday of January, 1868.

"NORTHERN DISTRICT OF NEW YORK, *ss:*

"The United States of America, plaintiffs in this suit, by William Dorsheimer, their attorney, complain of Jane Goodwin, Edward Mynderse, and Charles D. Mynderse, defendants herein, being in custody, &c., of a plea, that they render to the said plaintiffs the sum of eighteen thousand dollars, which to them they owe, and from them unjustly detain:

"For that the said defendants heretofore, to wit, on or about the 23d day of February, A. D. one thousand eight hundred and sixty-three, by their certain writing obligatory, sealed with their seals, and now shown to this court, acknowledged themselves to be held and firmly bound unto these plaintiffs, under the name of the United States of America, in the sum of eighteen thousand dollars, to be paid by the said defendants to these plaintiffs; which said writing obligatory
4 was and is subject to certain conditions thereunder written, whereby, after reciting that the said defendant Jane Goodwin had made application to the collector of internal revenue for the 25th collection district of the State of New York for a license as distiller, at the distillery situate in the town of Torrey, in the county of Yates, and State of New York, it was conditioned that if the said defendant Jane Goodwin should truly and faithfully conform to all the provisions of an act entitled 'An act to provide internal revenue to support the government and to pay interest on the public debt,' approved July 1, 1862, and of such other act or acts as were then or might thereafter be in that behalf enacted, then the said above obligation to be void and of no effect; otherwise it should abide and remain in full force and effect.

"And the said plaintiffs further allege that, although the said defendant Jane Goodwin continued to be and was a distiller of spirits

and spirituous liquors, and the owner and possessor of a distillery
5 situate in said town of Torrey, with certain stills, boilers, and other vessels used for the purpose of distilling spirits and spirituous liquors, from and including the first day of March, A. D. 1863, to and including the 5th day of May, A. D. 1864, yet the said defendant Jane Goodwin did not during that time, or any part thereof, truly and faithfully conform to all the provisions of the said act of Congress entitled 'An act to provide internal revenue to support the government and to pay interest on the public debt,' approved July 1, 1862, and of such other act or acts as were thereafter in that behalf enacted.

"And for a further breach of the said obligatory, the said plaintiffs allege that the said defendant Jane Goodwin, at the town of Torrey aforesaid, in the said 25th collection district of New York, from and including the month of March, A. D. 1863, to and including the 5th day of May, A. D. 1864, was, and continued during all that time to be, a distiller of spirits and spirituous liquors as aforesaid, and was the owner of certain stills, boilers, and other vessels used and intended to
6 be used for the purpose of distilling spirituous liquors, and had such stills, boilers, and other vessels under her superintendence on her own account, and used and intended to use such stills, boilers, and other vessels for the purpose of distilling spirituous liquors as the owner thereof, and neglected and refused from day to day to make true and exact entry, or cause to be entered in a book kept by her for that purpose, of the number of gallons of spirituous liquors distilled by her, and also of the number of gallons thereof sold or removed for consumption or for sale, and the proof thereof, and neglected and refused to keep such book always open in the daytime (Sundays excepted) for the inspection of the said collector, and neglected and refused to allow such collector to take any minutes, memorandums, or transcripts thereof, and neglected and refused to render to the said collector, on the first, tenth, and twentieth days of each and every month in each year, or within five days thereafter, or at any time, a general account in
7 writing, taken from her books, of the number of gallons of spirituous liquors distilled, sold, or removed for consumption or sale, and of the proof thereof, for the period or fractional part of a month, preceeding said day, or for such portion thereof as may have elapsed from the date of said entry, and report to the said day which next ensued, & neglected & refused to keep a book or books in form duly prescribed by the Commissioner of Internal Revenue, and which form had theretofore been duly prescribed by him, wherein was entered from day to day the quantities of grain or other vegatable productions, or other substances, put into the mash-tub for the purpose of producing spirits, and neglected and refused to keep such book or books open at all seasonable hours for inspection by the assessor and collector of the said district; and neglected to verify or cause to be verified the said entries, reports, books, and general accounts by oath or affirmation, taken before the said collector or some other officer authorized by the laws of the
8 State to administer the same according to the form required by law; and neglected and refused to pay to the said collector the duties on spirituous liquors so distilled and sold or removed for consumption or sale, and in said accounts mentioned, at the time of rendering an account thereof, or when such account should have been rendered, and neglected and refused to do any and every of the things by law required to be done by her, as duly required by the 45th section, and against the 45th section of the act of Congress, approved July 1, 1862, entitled 'An Act to provide internal revenue to support the gov-

ernment and to pay interest on the public debt,' and the several amendments thereof.

"And these plaintiffs, for a farther breach of the condition of the said writing obligatory, allege that the said defendant Jane Goodwin was, and continued to be, a distiller of spirits and spirituous liquors at the town of Torrey, in said 25th collection district of New York, from the 1st day of March, A. D. 1863, to and including the 5th day of May, A. D. 1864, and, during that time, at Torrey aforesaid, made, manu-
9 factured, and distilled, and sold and removed for consumption and sale, a large amount of spirits and spirituous liquors liable to duty and tax under the act of Congress before mentioned, and the various acts amendatory thereof, to wit, 489,756.56 gallons of spirits & spirituous liquors, upon which there was due and owing to the said these plaintiffs, for duties and taxes under and pursuant to the said several acts of Congress, the sum of $122,744 82 from the said Jane Goodwin, and which said duties and taxes the said defendant Jane Goodwin of right & law, and under the provisions of the said act of Congress hereinbefore mentioned, should have and was required to pay on the spirits and spirituous liquors made and distilled, and sold and removed for consumption and sale by her, on the first, tenth, and twentieth days of each month during said time, or within five days thereafter, to the collector of said district upon the amounts of spirits and spirituous liquors
10 so made and distilled, and sold and removed for consumption and sale by her, during such periods or parts of such months respectively.

"Yet the defendant Jane Goodwin did not make & render true accounts and reports thereof, or pay the duties and taxes due thereon, to the collector for the said 25th collection district, on the first, tenth, and twentieth days of each month, or within five days thereafter, during said time, nor did she pay, or cause to be paid, to the collector for said district the duties and taxes upon the said spirits and spirituous liquors made and distilled, and sold and removed for consumption or sale as aforesaid, during said period from March 1, 1863, to May 5, 1864, as of right and law and according to the condition of the said bond
11 she should have done; but, on the contrary thereof, the said defendant Jane Goodwin, of the said spirits and spirituous liquors so as aforesaid made, distilled, sold, and removed for consumption and sale, at Torrey aforesaid, during the period between March 1st, 1863, and May 5th, 1864, aforesaid, has at various times during that time returned to, and paid the tax and duties due and owing as aforesaid, to the collector for the said 25th district only upon 435,099.85 gallons thereof, and no more, to wit, the sum of $107,708 76, and no more, and has hitherto fraudulently neglected and refused to return and pay the taxes upon 54,656.51 gallons of spirits and spirituous liquors so as aforesaid by her during said time between March 1, 1863, and May 5, 1864, at Torrey, aforesaid, made and distilled, and removed for consumption and sale, upon which there was due and owing from her to these plaintiffs, for such duties and taxes under the acts of Congress aforesaid, the sum of $15,066.05, contrary to the condition of the
12 said writing obligatory hereinbefore firstly set forth.

"Whereby an action hath accrued to these plaintiffs to demand & have, of & from the said defendants, the said sum of $18,000, the sum above demanded.

"Yet the said defendants, although often requested so to do, have not paid to the said plaintiffs the said sum of eighteen thousand dollars, or any part thereof, but to pay the same, or any part thereof, have hith-

erto wholly neglected and refused, and still do neglect and refuse, to the damage of the said plaintiffs of eighteen thousand dollars; and therefore they bring suit, &c.

"WILLIAM DORSHEIMER,
"*United States Attorney for the Northern District of New York.*"

The defendants demurred to said declaration, as not sufficient in law to entitle the plaintiffs to maintain their action therein, in manner and form as follows, to wit:

13 "United States circuit court, northern district of New York, of January term, in the year one thousand eight hundred and sixty-nine, to wit, the 17th day of February, as yet in said term.

"EDWARD MYNDERSE & CHARLES D. MYNderse, survivors of themselves and Jane Goodwin, deceased,
"*ads.*
"THE UNITED STATES OF AMERICA.

"And the said defendants, Edward Mynderse and Charles D. Mynderse, survivors of themselves and Jane Goodwin, deceased, by C. J. Folger, their attorney, come and defend the wrong and injury when, &c., and say that the said declaration and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain its aforesaid action thereof against the said defendants, and that they, the said defendants, are not bound by law to answer the same; and this they are ready to verify. Wherefore, by reason of the insufficiency of the said dec-
14 laration in this behalf, the said defendants pray judgment, and that the said plaintiff may be barred from having or maintaining its aforesaid action thereof against them, &c.

"And the said defendants, according to the form of the statute in such case made and provided, state and show to the court here the following causes of demurrer to the said declaration, that is to say, that the condition of the said writing obligatory mentioned in said declaration, as set forth in said declaration, is not in conformity with the requirements of the said act of Congress mentioned and referred to in said declaration, or with the requirements or provisions of any act of Congress, or of any law, and the writing obligatory was and is void in law; and also that the said declaration is in other respects uncertain, informal, and insufficient.

"C. J. FOLGER,
*Def'ts' Att'y.*

The said plaintiffs thereupon joined in demurrer as follows, to wit:

15 "U. S. circuit court, northern district of N. Y., of January term, 1869, to wit, of the 17th day of February, 1869, as yet in said term.

"UNITED STATES
"*vs.*
"EDWARD MYNDERSE & CHARLES D. MYNderse, survivors, &c., of Jane Goodwin, deceased.

"And the said plaintiffs saith the said declaration and the matters

therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for it, the said plaintiff, to have and maintain its aforesaid action thereof against the said defendants, and the said plaintiff is ready to verify and prove the same, as the court here shall direct and award.

"Wherefore, inasmuch as the said defendants have not answered the said declaration, nor hitherto in any manner denied the same, the said plaintiff prays judgment and its debt aforesaid, together with its damages by it sustained to be adjudged to it, &c.

"WILLIAM DORSHEIMER,
"*U. S. Attorney.*"

16 And the said cause coming on to be heard at the last term of this court, it occurred as a question of law whether or no the condition of the said bond so far departs from the requirements of the act of Congress in that behalf that the said bond is void, and therefore whether the said declaration and the matters therein stated are sufficient in law to entitle the plaintiffs to maintain their said action herein against the said defendants.

On which question the opinions of the judges were opposed.

Whereupon, on motion of the United States, by their attorney, that the point on which the disagreement hath happened may at this term be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court of the United States, to be finally decided—

It is ordered that the foregoing statement of the pleadings, and of the said question of law which is made under the direction of said judges, be certified according to the request of the said United States by their said attorney, and the law in that case made and provided.

L. B. WOODRUFF, [L. S.]
*Circuit Judge.*
N. K. HALL, [L. S.]
*U. S. Dist. Judge.*

17 CIRCUIT COURT OF UNITED STATES,
*Northern District of New York, Clerk's Office, Utica, N. Y.:*

Certified to the Supreme Court of the United States, pursuant to the statute.

Witness my hand & official seal at my office, in Utica, in said district, this 21st day of July, A. D. 1870.

[SEAL.] AUGUSTUS A. BOYCE, *Clerk.*

(Indorsed:) U. S. Supreme Court. The U. S. of America vs. Edward Mynderse, Charles D. Mynderse, survivors, &c. Return from U. S. circuit court, northern district of New York.

(Indorsement on cover:) No. 469. The United States, plaintiffs, vs Edward Mynderse & Charles D. Mynderse, survivors, &c. N. New York C. C. U. S.

Filed 25th July, 1870.

REC. 469—2

# In the Supreme Court of the United States.

DECEMBER TERM, 1870.

THE UNITED STATES, *Plaintiffs*,
*vs.*
EDWARD MYNDERSE AND CHARLES D. MYNDERSE, SURVIVORS, &c.
No. 237.

*Certificate of Division in Opinion between the Judges of the Circuit Court of the United States for the Northern District of New York.*

BRIEF FOR THE UNITED STATES

This is an action of debt brought by the United States against the defendants and one Jane Goodwin, now deceased, as principal and sureties on a distiller's bond, given under the 39th section of the internal revenue law of July 1, 1862, (12 Stat., 446,) the condition whereof was, "that if the said Jane Goodwin should truly and faithfully conform to all the provisions of an act entitled 'An act to provide internal revenue to support the Government and to pay interest on the public debt,' approved July 1, 1862, and of such other act or acts as were then or might thereafter be in that behalf enacted, then the said above obligation to be void and of no effect, otherwise it should abide and remain in full force and effect."

The 39th section of the act of 1862, cited above, de-

scribes the condition of the bond thereby required, and the 45th section of the same act enjoins certain duties upon distillers, which are prescribed in language nearly corresponding with that employed in the 39th section.

The breaches specially assigned in the declaration include, and were designed to include, violations of the requirements of both sections.

DEMURRER AND REJOINDER.

The cause afterwards coming on to be heard, it occurred as a question "Whether or no the condition of the said bond so far departs from the requirements of the act of Congress in that behalf that the said bond is void, and, therefore, whether the said declaration and the matters therein stated are sufficient in law to entitle the plaintiffs to maintain their said action herein against the said defendants."

The opinions of the judges being opposed on this question, it was, on motion of the attorney for the United States, ordered to be certified to this court for final decision.

This case appears to be governed entirely by the recent decision in United States *vs.* Hodson, (10 Wall., 395,) and it is, accordingly, submitted that, under the authority of that decision, the first branch of the question presented should be answered in the negative, and the last branch of it in the affirmative.

B. H. BRISTOW,
*Solicitor General.*

C. H. HILL,
*Assistant Attorney General.*

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